

STATE OF MICHIGAN  
COURT OF APPEALS

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PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

MARIANO JESUS CRUZ,

Defendant-Appellant.

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UNPUBLISHED

March 28, 2000

No. 213462

Calhoun Circuit Court

LC No. 97-004180-FC

Before: Gage, P.J., and Meter and Owens, JJ.

PER CURIAM.

A circuit court jury convicted defendant of voluntary manslaughter, MCL 750.321; MSA 28.553, and possession of a firearm during the commission of a felony, MCL 750.227b; MSA 28.424(2). He was sentenced to consecutive terms of imprisonment of two years for the felony-firearm conviction and six to fifteen years for the manslaughter conviction. Defendant appeals as of right. We affirm.

Defendant argues that he is entitled to resentencing because his trial counsel rendered ineffective assistance of counsel at the sentencing proceeding. Defendant failed to preserve this issue for appellate review by moving in the trial court for a new trial or an evidentiary hearing. *People v Hedelsky*, 162 Mich App 382, 387; 412 NW2d 746 (1987). Accordingly, review may be granted if the record contains sufficient detail to support the defendant's position; if so, review is limited to the record. *Id.*

In order to establish ineffective assistance of counsel, the defendant must show that counsel's performance fell below an objective standard of reasonableness, and that the representation so prejudiced the defendant as to deprive him of a fair trial. *People v Pickens*, 446 Mich 298, 303; 521 NW2d 797 (1994).

Defendant argues that his trial counsel was ineffective for failing to show defendant the presentence investigation report before sentencing and thereby for precluding defendant from challenging the accuracy of specific information contained in the PSIR. A review of the sentencing transcript reveals that the trial court asked defense counsel whether he had reviewed the PSIR with defendant. Defense counsel responded that he had. Defendant offered no contradictory statement on

the record. In fact, he remained silent. On appeal, defendant supports his claim with an ex parte affidavit. Defendant may not enlarge the record on appeal by ex parte affidavit filed for the first time during the appeal. *People v Taylor*, 383 Mich 338, 362; 175 NW2d 715 (1970). Under these circumstances, the record does not support defendant's claim that he was not shown the PSIR, or demonstrate that any action taken by counsel prevented defendant from challenging the accuracy of the information in the PSIR.

Additionally, our review of the sentencing transcript reveals that the trial court did not rely on the information which defendant now alleges is inaccurate when fashioning defendant's sentence. Absent evidence that the court relied on this information, defendant has not shown that a challenge to the alleged inaccurate information would have altered the result of the sentencing. Therefore, defendant may not prevail on his claim of ineffective assistance because he has failed to demonstrate that he was prejudiced by his counsel's alleged failure to share the PSIR with him. *People v Crawford*, 232 Mich App 608, 615; 591 NW2d 669 (1998).

Finally, defendant argues that defense counsel was ineffective for failing to challenge the scoring of Offense Variables 3 and 6. Defendant's belief that the offense variables were erroneously scored is premised on a challenge to the trial court's discretionary interpretation of the unchallenged facts. Such a challenge is not in itself a claim of legal error that renders the sentence imposed invalid. *People v Mitchell*, 454 Mich 145, 175-177; 560 NW2d 600 (1997). "Appellate courts are not to interpret the guidelines or to score and rescore variables for offense and prior record to determine if they were correctly applied." *Id.* at 178. "A putative error in the scoring of the sentencing guidelines is simply not a basis upon which an appellate court can grant relief." *People v Raby*, 456 Mich 487, 499; 572 NW2d 644 (1998).

Because any scoring error as alleged by defendant does not invalidate defendant's manslaughter sentence, any such error cannot be said to undermine the confidence in the outcome of the sentencing proceeding. Furthermore, we find defendant's six-year sentence for manslaughter to be proportionate to the seriousness of the circumstances surrounding the offense and the offender. *People v Milbourn*, 435 Mich 630, 636; 461 NW2d 1 (1990). Under these circumstances, defendant's claim of ineffective assistance of counsel fails for lack of record support. *Pickens, supra* at 327; *Messenger, supra* at 181.

Affirmed.

/s/ Hilda R. Gage  
/s/ Patrick M. Meter  
/s/ Donald S. Owens